

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 20, 2008

ALFONSO C. CAMACHO v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Rutherford County
No. 60843 Don R. Ash, Judge

No. M2008-00410-CCA-R3-PC - Filed August 18, 2009

The petitioner, Alfonso C. Camacho, appeals the Rutherford County Circuit Court's denial of his petition for post-conviction relief. The petitioner, pursuant to a plea agreement, pled guilty to second degree murder (a Class A felony) and attempted second degree murder (a Class B felony) and received an effective sentence of thirty years to be served at 100%. On appeal, the petitioner contends that his guilty pleas were not knowingly and voluntarily entered due to the ineffective assistance of counsel in failing to explain that the sentence would be served at 100%, as well as the elements of the offenses, and the trial court's failure to comply with Tennessee Rule of Criminal Procedure 11. Following review, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA MCGEE OGLE, JJ., joined.

Guy R. Dotson, Jr., Murfreesboro, Tennessee, for the appellant, Alfonso C. Camacho.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and J. Paul Newman, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The relevant underlying facts of the case, as recited during the guilty plea hearing, are as follows:

On the present indictment, 59373, had this matter gone to trial the State would have introduced witnesses to include Detective John Liehr, of the Smyrna Police Department, who the State believes would testify as follows. That on or about May

18th, 2005, he responded to 407 McClary Road in Smyrna in reference to a shooting. When he arrived there he observed that a Mr. Juan Diaz had been shot once in the chest and was deceased at the scene. He also learned that Renya Gonzalez had been shot three times, but that she was alive and conscious at the scene. At the scene Ms. Gonzalez told the police officers that [the petitioner] had shot her and her boyfriend, Mr. Diaz. According to the investigation [the petitioner] at the time of the shooting was under an order of protection and that in violation of the order of protection that he did come about her residence, that he had been seen previously that afternoon by neighbors in the victim's neighborhood, that he wanted to see the victim and the victim's children, Ms. Gonzalez; and did not want the neighbor to tell Ms. Gonzalez that he was there. According to his statement to Detective Liehr he did come to Smyrna that day. He did ask about seeing the kids. And before that had parked his car at the local McDonald's in Smyrna and had walked to her neighborhood. He waited there for quite some time. The police investigation revealed it to be more than an hour. And at that time he sees Ms. Renya Gonzalez at her car. At this point there is a dispute of the facts in that according to one witness and the [petitioner] that Mr. Diaz drove up in his car or van and approached him in a rapid manner. And that he at that time, [the petitioner], pulled a pistol from his pocket and shot one time which resulted in the death of Mr. Diaz. Then according to his statement because Ms. Gonzalez continued to yell he shot her a total of three times. And then fled the scene. As a result of the injury to Ms. Gonzalez, she lost both kidneys. Did have damage to the spleen but is recovering from the spleen injury. She presently has dialysis twice a week. After fleeing here, fleeing the scene, he went to Kentucky where the day after the murder he was approached by Kentucky police and he pulled a firearm on the Kentucky State Trooper who is here and present today. And the Kentucky State Trooper shot first and struck the [petitioner]. The weapon was recovered. Was sent to the TBI crime laboratory. It was compared to cartridge shells found at the crime scene. One lying next to the victim, Gonzalez, and one in her car. The determination by Agent Tommy Heflin was that the gun that was recovered by Kentucky police was the gun that did fire those two spent rounds.

Based upon the foregoing facts, the petitioner, pursuant to a negotiated plea agreement, pled guilty to second degree murder and attempted second degree murder. Pursuant to the agreement, the petitioner received an effective thirty-year sentence, which was to be served at 100% as a violent offender.

The record establishes that at the plea submission hearing, trial counsel specifically stated to the trial court that both he and the petitioner felt the agreement was an adequate settlement. He specifically stated that he and the petitioner

along with the interpreters sat down and we went through a negotiated plea agreement form. [The petitioner], who can read Spanish quite well, had the opportunity to read this form. It is a bilingual form. We've had the opportunity

again to go through that with him. This time of course with Mr. Osier who is a certified interpreter. And I can present to the Court that I feel my client understands what he's doing.

Afterward, utilizing the services of an interpreter, the trial court questioned the petitioner prior to acceptance of the pleas. The petitioner testified that he had not been coerced into accepting the agreement and that he was entering the pleas freely and voluntarily. The petitioner stated that he had no complaints against trial counsel and that trial counsel had explained the range of punishment possible for all offenses and had discussed possible defenses. The petitioner then stated on the record that trial counsel had reviewed the plea agreement with him and that he understood it completely.

Subsequently, the petitioner filed a timely *pro se* petition for post-conviction which alleged that his guilty pleas were not knowingly and voluntarily entered based upon trial counsel's ineffectiveness in not explaining that his sentence would be served at 100% or what the offenses he was charged with entailed. He further asserted that the trial court failed to ask the proper questions at the plea submission hearing in order to ensure that the pleas were being entered voluntarily. Post-conviction counsel was later appointed to represent the petitioner in pursuit of his claim. However, the petitioner subsequently refused to participate in the case, even refusing transport to the post-conviction hearing. Two witnesses testified at the post-conviction hearing.

The first to testify was Amy Calzadilla, a Spanish language interpreter who testified that she had reviewed the audio recording of the guilty plea hearing and the transcript which was prepared later. According to Mrs. Calzadilla, the Spanish spoken and translated into English on the audio recording was accurately translated in the transcript.

The only other witness called to testify was trial counsel, who stated that he had been appointed to represent the petitioner. According to trial counsel, the petitioner spoke primarily Spanish but was able to understand some English. Nonetheless, in order to ensure adequate communication, trial counsel hired investigators in the case who were fluent in Spanish. These investigators worked with trial counsel to interpret what the petitioner himself said, as well as interviewing a number of Spanish-speaking witnesses.

Trial counsel testified that he met with the petitioner on eight to ten occasions and that the petitioner assisted in his own defense. The interpreters were present on all but two occasions, and trial counsel believed that the petitioner understood their discussions. Moreover, trial counsel had the petitioner evaluated, and he was found to be competent.

Trial counsel stated that the petitioner entered his guilty pleas a day or two before his trial was to begin and that counsel was prepared to take the case to trial. He had spoken with all of the witnesses, explored possible defenses, and discussed the case with the petitioner. According to trial counsel, the State extended an offer to the petitioner, which he refused. The petitioner then proposed an offer, which defense counsel took to the State, regarding the number of years the petitioner would

be willing to accept. The State agreed to accept the petitioner's counteroffer. Trial counsel specifically testified that he discussed release eligibility dates with the petitioner and explained the parameters of the plea agreement on at least three separate occasions. He believed there was sufficient evidence to support the plea agreement and stated that he felt comfortable with the plea agreement. With regard to the day the pleas were entered, trial counsel did not recall the petitioner being "fuzzy headed" and stated that he appeared to understand their discussions.

Following this testimony, the post-conviction found that the petitioner had failed to carry his burden with regard to post-conviction relief and denied the petition. This timely appeal followed.

Analysis

On appeal, the petitioner has raised two issues for our review: (1) whether the petitioner was effectively represented by trial counsel during the investigation and plea of his case; and (2) whether the trial court properly informed the petitioner of his rights and determined that the petitioner understood the plea agreement he was entering. His entire argument with regard to the ineffective claim, other than a recitation of relevant post-conviction law, is as follows:

However, Petitioner avers that at no time did either detective, hired by [trial counsel] to investigate and translate, mention that the 30-year sentence would be at 100% with no eligibility for parole, nor did either detective explain to the Petitioner what Attempted Second Degree Murder and Second Degree Murder entailed or what Range II represented.

Other than a recitation of Tennessee Rule of Criminal Procedure 11, the petitioner's entire argument with regard to his second issue is as follows:

The Trial Court never explained to Petitioner, nor asked Petitioner if he understood what Attempted Second Degree Murder and Second Degree Murder entailed, nor Range II. The Trial Court also did not inform Petitioner that his sentence would be at 100% with no eligibility for parole. Petitioner was being treated with psychotropic drugs and was not questioned by the court or his attorney at any time regarding his state of mind and his ability to understand the proceedings against him.

Though enumerated as two separate issues by the petitioner, we glean from a reading of his argument on appeal and his post-conviction petition that he is essentially challenging the voluntariness of his plea. He is arguing that, based upon both the ineffective assistance of trial counsel and the trial court's failure to adequately inform him, his pleas were not knowingly and voluntarily entered. Thus, we review accordingly.

In evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that "[t]he standard was and remains whether the plea represents a voluntary and

intelligent choice among the alternative courses of action open to the defendant.” *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164 (1970). In making this determination, the reviewing court must look to the totality of the circumstances. *State v. Turner*, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995); *see also Chamberlain v. State*, 815 S.W.2d 534, 542 (Tenn. Crim. App. 1990). Indeed, a

court charged with determining whether . . . pleas were ‘voluntary’ and ‘intelligent’ must look to various circumstantial factors, such as the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993).

Once a guilty plea has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. In this respect, such claims of ineffective assistance necessarily implicate that guilty pleas be voluntarily and intelligently made. *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985) (citing *Alford*, 400 U.S. at 31, 91 S. Ct. at 164).

To succeed in a challenge for ineffective assistance of counsel, the petitioner must demonstrate that counsel’s representation fell below the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), the petitioner must establish (1) deficient representation and (2) prejudice resulting from the deficiency. In the context of a guilty plea, to satisfy the second prong of *Strickland*, the petitioner must show that “there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Lockhart*, 474 U.S. at 59, 106 S. Ct. at 370; *see also Walton v. State*, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997). The petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceeding. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This deference to the tactical decisions of trial counsel, however, is dependant upon a showing that the decisions were made after adequate preparation. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). Moreover, issues regarding the credibility of witnesses and the weight and value to be accorded their testimony are to be resolved by the post-conviction court as the trier of fact. *Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997).

The issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). “A trial court’s *findings of fact* underlying a claim of ineffective assistance of counsel are reviewed on appeal under a *de novo* standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise.” *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001)

(citing Tenn. R. App. P. 13(d)). However, *conclusions of law* are reviewed under a purely *de novo* standard, with no presumption of correctness. *Id.* at 458.

The only assertion of deficient performance made by the petitioner is trial counsel's failure to adequately inform him of the nature of the charges against him and that the agreed-upon sentence would be served at 100%. The only testimony provided at the hearing relevant to this issue was that of trial counsel himself, who specifically testified that, on multiple occasions, he and the petitioner reviewed both the nature of the offenses and the sentence. The post-conviction court, based upon its denial of post-conviction relief, clearly accredited that testimony. It is not the province of this court to reweigh that credibility determination. *See Henley*, 960 S.W.2d at 579.

Review of the record reveals that trial counsel's testimony established that he investigated the case and was prepared for trial. He was aware of the petitioner's limited understanding of English and, accordingly, hired investigators who could communicate with the petitioner. Trial counsel met with the petitioner on multiple occasions and worked with the petitioner to formulate a defense. According to his testimony, trial counsel, upon the offer of a plea agreement, thoroughly reviewed the agreement with the petitioner and explained to the petitioner that he would be agreeing to serve the thirty-year sentence at 100%. Based upon this uncontradicted evidence, we find nothing to preponderate against the post-conviction court's findings that the petitioner failed to satisfy his burden of showing either deficient performance or prejudice. The evidence offered established that trial counsel provided effective representation in both his investigation of the case and in his explanation of all elements of the offenses and the parameters of the plea agreement.

We also find without merit the petitioner's contention that the trial court failed to comply with Rule 11. Tennessee Rule of Criminal Procedure 11 provides that prior to accepting a guilty plea, the trial court should address the defendant in open court to determine if the plea is "voluntary and is not the result of force, threats, or promises (other than promises in a plea agreement)" and to determine that a factual basis for the guilty plea exists. Tenn. R. Crim. P. 11(I)(2), (3). The rule further provides:

Before accepting a guilty or nolo contendere plea, the court shall address the defendant personally in open court and inform the defendant of, and determine that he or she understands, the following:

- (A) The nature of the charge to which the plea is offered;
- (B) the maximum possible penalty and any mandatory minimum penalty;
- (C) if the defendant is not represented by an attorney, the right to be represented by counsel - and if necessary have the court appoint counsel - at trial and every other stage of the proceeding;

- (D) the right to plead not guilty or, having already so pleaded, to persist in that plea;
- (E) the right to a jury trial;
- (F) the right to confront and cross-examine adverse witnesses;
- (G) the right to be protected from compelled self-incrimination;
- (H) if the defendant pleads guilty or nolo contendere, the defendant waives the right to a trial and there will not be a further trial of any kind except as to sentence; and
- (I) if the defendant pleads guilty or nolo contendere, the court may ask the defendant questions about the offense to which he or she has pleaded. If the defendant answers these questions under oath, on the record, and in the presence of counsel, the answers may later be used against the defendant in a prosecution for perjury or aggravated perjury.

Tenn. R. Crim. P. 11(b)(1). Substantial compliance with Rule 11 is sufficient for the trial court to properly accept a plea. *State v. Newsome*, 778 S.W.2d 34, 37 (Tenn. 1989).

A review of the plea hearing transcript indicates that the trial court substantially complied with the rule. The trial court, after hearing a factual basis for the plea, personally conducted an examination of the petitioner, during which the court asked if the plea was being entered freely and voluntarily; if the asserted facts were basically correct; if the petitioner had complaints against trial counsel; and if trial counsel had explained the range of punishment for the offenses, possible defenses, and what the State would be required to prove. The petitioner responded affirmatively to each of these questions. The court then addressed the petitioner regarding the required litany of rights, including the right not to plead guilty, the right to trial, the right to the assistance of counsel, the right to cross-examine witnesses, the right to compel production of evidence, and the presumption of innocence. The trial court then asked the petitioner if he had been coerced into signing the plea agreement, and the petitioner responded in the negative. The court also asked the petitioner if trial counsel had reviewed the agreement with him and if he understood the agreement completely, to which the petitioner responded affirmatively. While the court did not specifically address the issue of whether the petitioner was on any type of psychotropic drugs, we agree with the post-conviction court that the petitioner has failed to establish that he was. We must conclude that the litany of questions posed by the trial court was more than sufficient to ensure the petitioner's understanding of the plea and the consequences of accepting the agreement.

Having thus concluded, we must then address the petitioner's contentions that his plea was not knowingly and voluntarily entered. After review of the record, we, as did the post-conviction court, conclude that the petitioner has again failed to establish his contention. The post-conviction court, in its order denying relief, stated:

Looking to the totality of the circumstances, the Court finds the Petitioner entered a voluntary plea because evidence proves he can read and write, understands some English, was accompanied by a certified Court Interpreter, he was represented by competent counsel, he had opportunity to confer with his counsel, and he entered a guilty plea in order to receive sentence less than a trial possibly would have resulted in. . . . The Court also finds the Petitioner entered a knowing plea because, according to the plea transcript, the Court revealed that he fully understood the plea and its consequences. In addition, [the] Petitioner has not satisfied his burden of proving he was on psychotropic drugs which could render his plea involuntary.

We concur. Having previously concluded that trial counsel was effective and that the trial court adequately explained the terms of the agreement to the petitioner, we must conclude that the pleas were entered knowingly and voluntarily. The record reveals evidence that the petitioner himself was an active participant in negotiating the plea agreement. Moreover, the transcript of the plea hearing indicates that the petitioner stood before the court and, through his interpreter, stated he was voluntarily entering the plea, which he acknowledged he understood. A petitioner's plea of guilty constitutes an admission in open court that the petitioner committed the acts charged in the indictment. *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1468 (1970). The plea, however, is more than an admission; it is the petitioner's consent that judgment of conviction may be entered without a trial. *Id.*, 90 S. Ct. at 1469. A petitioner's sworn responses to the litany of questions posed by the trial judge at the plea submission hearing represent more than lip service. Indeed, the petitioner's sworn statements and admissions of guilt stand as a witness against the petitioner at the post-conviction hearing when the petitioner disavows those statements. Our review of the entire record, including the plea submission hearing, affirmatively demonstrates that the petitioner's guilty pleas were made with an awareness of the consequences, and, as such, the guilty pleas were voluntarily and knowingly entered. See *State v. Mackey*, 553 S.W.2d 337, 340 (Tenn. 1977).

Conclusion

Based upon the foregoing, the denial of post-conviction relief is affirmed.

JOHN EVERETT WILLIAMS, JUDGE